

1949

## Maude Baker v. L. Jansen, dba Utah House Cleaning Company : Brief of Appellant

Utah Supreme Court

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Ray, Quinney & Nebeker; Grant C. Aadnesen; Attorneys for Defendant and Appellant;

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### Recommended Citation

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

MAUDE BAKER,

*Plaintiff and Respondent,*

vs.

L. JANSEN, doing business as UTAH  
HOUSE CLEANING COMPANY,

*Defendant and Appellant.*

APPELLANT'S BRIEF

FILED

FEB 10 1949

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CLERK, SUPREME COURT, UTAH

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# IN THE SUPREME COURT of the STATE OF UTAH

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MAUDE BAKER,

*Plaintiff and Respondent,*

vs.

L. JANSEN, doing business as UTAH  
HOUSE CLEANING COMPANY,

*Defendant and Appellant.*

Case No.  
7239

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## APPELLANT'S BRIEF

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### STATEMENT OF FACTS

The plaintiff brought this action against the defendants Stanley D. Decker and L. Jansen, doing business as Utah House Cleaning Company, for damages alleged to have resulted to her on the morning of January 29, 1946, from a fall while she was walking along the second story hallway of the Roosevelt Apartments in Salt Lake City, Utah. The case was tried before a jury and at the close of plaintiff's case a motion for nonsuit was granted in favor of the defendant, Stanley

D. Decker. (R. 106) After the parties had introduced their evidence and rested, the trial court denied the motion of the defendant, L. Jansen, for a directed verdict, and the case was submitted to the jury. The jury returned a verdict for the plaintiff and against the defendant, L. Jansen, and it is from this verdict and the judgment which was entered that defendant appeals.

The Roosevelt Apartment House is a three-story building facing north on Third South Street in Salt Lake City. There is a driveway on the east side of the building which leads from the street to garages at the rear of the building. Each of the three floors has a hallway running north and south the full length of the building. There are three stairways in the building, one in front, one in back and one on the east side. These stairways connect the three floors each with the other, thereby allowing traverse of the floor above or below from any stairway. After descending to the main floor level, the front or north stairway continues to the front entrance, the east stairway continues to an alleyway entrance, and the back or south stairway continues to the back entrance. Mrs. Baker lived in Apartment 212, which is the second apartment from the south end of the building on the east side of the second floor. (R. 90-93, Exhibit 5)

The defendant L. Jansen, doing business as Utah House Cleaning Company, was engaged in the business of painting, papering and housecleaning. He had en-

tered into a contract with the defendant, Stanley D. Decker, the owner of the Roosevelt Apartments, to paint the woodwork, paper the ceilings and walls of the halls and stairways and wash the wainscoting on the lower walls of said apartment house. He began work four or five days prior to the 29th of January and had completed the top floor and all of the second floor except the north part of the hallway and front stairway. (R. 111-112) At 8:00 o'clock on the morning of the 29th, he and his helper, Leonard Vermaas, set up their equipment in the north part of the second floor hallway. This equipment consisted of a canvas drop cloth, a papering table, a tool box and a paste bucket. (R. 112-113) The canvas was twelve feet long, folded to make a three-foot width and placed under the table to receive the strips of paper after the paper had been trimmed. (R. 113, 131) The table was seven feet long, three feet wide and three feet high (R. 130) and placed on top of the canvas and flush against the east wall of the hallway (R. 114) north of the east stairway. The tool box was eighteen inches wide by eighteen inches high (R. 129) and placed opposite the south end of the table from two to six inches east of the west wall. The paste bucket was ten inches high and placed on top of the tool box with a six inch brush in a holder in the bucket. (R. 115, 129, 146, 160) A 100-watt electric light was hanging directly over the papering table about one foot down from the ceiling, secured by means of an extension cord wrapped around the ceiling light fixture and plugged into an outlet on the east wall under the table.

(R. 151, 152) Another 100-watt light in a floor lamp without a shade was located at the north stairway on the second floor where Mr. Jansen and his helper, Mr. Vermaas, were working. There were three stationary lights in the hall and one over each stairway. The hallway of the second floor was 5 feet 2 inches in width. It was 28 feet 6 inches from Mrs. Baker's apartment south to the back stairway (R. 127), 56 feet from her apartment north to the east stairway (R. 128), 22 feet north from the east stairway to the table (R. 127, Exhibit 5) and about 180 feet long from the south stairway to the north stairway. (R. 186). The front stairway on the morning of the accident was blocked by a plank between two ladders. (R. 115, 143, 155)

On the morning in question the plaintiff left her apartment at about ten minutes to nine o'clock to go to her place of employment at the Community Chest office. As she came into the hall she noticed the paper hanger's table along the east wall, the canvas underneath the table and the container or bucket to the west of the table near the west wall and opposite the south end of the table. (R. 84, 93-97, 190-192) The two 100-watt lights, the stairway light and the center light in the hall were burning. She did not recall seeing the tool chest nor did she remember seeing the men, but she either observed them or heard their voices for she knew they were there. She noticed that the canvas was spread out covering the carpet, (R. 95) uneven, crumpled and bunched at the end of the table. (R. 191) She observed this condition of the canvas and the location of

the bucket and table before she attempted to walk through the space between the bucket and the table and to step over the canvas. (R. 192) She stepped over the canvas with her left foot, caught her right heel in it and fell. She fell between the table and the west wall with her head to the north. (R. 98) The defendant Mr. Jansen and Mr. Vermaas ran to her immediately, and after a few minutes carried her to her apartment.

### STATEMENT OF ERRORS

1. The trial court erred in overruling the general demurrer of the defendant, L. Jansen, to the plaintiff's amended complaint. (R. 15)

2. The trial court erred in failing to grant the motion of the defendant, L. Jansen, for a nonsuit. (R. 24 and 106-7)

3. The trial court erred in failing to direct the jury to return a verdict for the defendant, L. Jansen. (R. 25, 39, 194-5 and 197)

4. The trial court erred in giving Instruction No. 5 as follows:

“You are instructed that if the defendant, L. Jansen, and his employees, while performing their work in the hallway on the second floor of the Roosevelt Apartments, knew or should have known that it would not be reasonably safe for persons using said hallway to cross over the canvas or pass their equipment, then it was the duty of said defendant or his em-

ployees either to block off said hallway where they were working or to instruct and advise persons using the same to use the other stairway; and if you find from the evidence that they failed in this duty and that by reason thereof plaintiff, while using ordinary care for her own safety, was injured, then your verdict shall be in favor of the plaintiff and against the defendant.” (R. 32 and 199-200)

5. The trial court erred in giving written Instruction No. 4 as follows:

“You are instructed that it was the duty of the defendant, L. Jansen, and his employees to keep the floor of the hallway on the second floor of the apartment building reasonably safe for plaintiff in her use of the hallway, and that if the said defendant in spreading canvas on the floor or in permitting tools and equipment to be left and strewn about the hallway in such a manner as to make the hallway dangerous, or not reasonably safe for the plaintiff in her use thereof, then the said defendant was negligent.” (R. 31-2 and 198-9)

and in giving orally as part of Instruction No. 4, then striking the same from the written instruction, the following:

“And if you find that in exercising ordinary care for her own safety, plaintiff was injured by the negligence of the defendant, if you find that the defendant was negligent, then your verdict should be for the plaintiff and against the defendant Jansen.” (R. 32 and 198-9)

6. The trial court erred in giving that part of Instruction No. 8 defining "negligence." (R. 33-4 and 200)

7. The trial court erred in giving Instruction No. 10 on the measure of damages. (R. 34-5 and 200)

8. The trial court erred in refusing to give the defendant, L. Jansen's requested instruction No. 6 as follows:

"You are instructed that Mrs. Baker in traversing the hallway of the apartment was not relieved of the necessity of exercising ordinary care for her own safety. If you find that the defendant's equipment was placed in the hallway in such a manner that it constituted a hazard which plaintiff under the circumstances should have observed and that plaintiff, notwithstanding the fact that other exits were available to her, proceeded to take the hazardous course, then you must find that she assumed the risk of any injury which she sustained and your verdict shall be in favor of the defendant Jansen, no cause of action." (R. 45 and 197-8)

9. The trial court erred in refusing to give the defendant L. Jansen's requested instruction No. 8, as follows:

"If you find that the defendant's equipment was placed in the hallway in such a manner that it constituted a hazard and that plain-

tiff observed, or in the exercise of ordinary care should have observed such hazard, then you are instructed that plaintiff was negligent in not taking either the east or south stairways which were available to her and your verdict shall be against the plaintiff and in favor of the defendant Jansen, no cause of action.” (R. 47 and 198)

10. The trial court erred in refusing to give the defendant L. Jansen’s requested instruction No. 9, as follows:

“You are instructed that Mrs. Baker in traversing the hallway of the apartment is not relieved of the necessity of exercising ordinary care for her own safety regardless of whether the equipment of the defendant was so placed in the hallway that it did or did not constitute a hazard. Therefore, if you believe from all of the evidence that plaintiff acted in a careless or negligent manner in passing by or over the equipment and that such carelessness or negligence resulted in the injury complained of, your verdict shall be in favor of the defendant L. Jansen, no cause of action.” (R. 48 and 198)

11. The trial court erred in overruling the motion of defendant, L. Jansen, for judgment notwithstanding the verdict of the jury. (R. 26, 63 and 204)

12. The trial court erred in overruling defendant, L. Jansen’s motion for new trial. (R. 56-7, 63, 66-8 and 203-6)

POINT I. THE COURT ERRED IN OVERRULING  
DEFENDANT, L. JANSEN'S GENERAL  
DEMURRER TO PLAINTIFF'S  
AMENDED COMPLAINT.

Plaintiff pleads facts in her complaint apparently known to her and observed by her. The part of her complaint alleging the condition of the hallway and charging the defendants with negligence reads as follows:

"4. That on the second floor there is a hallway extending from the front to the rear of said floor with a stairway leading to the first floor at each end of said hallway.

"5. That on the 29th day of January, 1946, while said defendants were papering or cleaning the hallway on the second floor of said apartment building, said defendants were negligent and careless in the following particulars, to-wit:

"(a) That the cloth and covering put up on [sic] the floor to protect the same was laid or permitted to become ruffled and uneven, so that people traversing said hallway across and over said covering might catch their feet in the same and fall.

"(b) That said defendants negligently and carelessly permitted their tools and equipment to become strewn in said hallway so that they would be a hazard to people walking down said hallway.

"(c) That the defendants failed and neglected to advise and warn individuals using said

hallway, and particularly their tenants and said plaintiff, that they should not walk along said passage.

“(d) That the defendants failed and neglected to place barricade or signs across said hallway so that tenants and other people would be warned not to use said hallway and permitted people to traverse back and forth along said hallway.

“6. That by reason of the careless and negligent acts aforesaid and as the sole and proximate cause thereof, plaintiff, while proceeding along said hallway and *unaware* of the fact that same was not open to use, caught her foot in said cloth or stumbled over the equipment of the defendants, which caused her to fall. \* \* \*

” (Italics ours).

No claim is made that the hallway was not sufficiently lighted nor that plaintiff was in any manner unable to see the ruffled and uneven canvas and the tools and equipment. Although the canvas, tools and equipment in the hall by any reading of the complaint in fact constituted a barricade and a warning, plaintiff, because she was “unaware” of the fact that the same was not open to use, “caught her foot in said cloth or stumbled over the equipment.” It is doubtful that the complaint states facts sufficient to show culpable negligence against the defendant, Jansen, as the condition of the hallway as alleged does not show that a hazard existed. If the complaint could be construed to allege a hazardous condition, plaintiff cannot be heard to say that she was unaware of such condition when it was

open and obvious, and she does not allege facts showing a reason for her inability to observe it. It is further apparent that plaintiff did not have to subject herself to the alleged hazard, for, as she states, there was a stairway leading to the first floor at each end of the hallway and plaintiff does not allege that the hallway was hazardous in all of the directions available to her.

POINT II. THE DEFENDANT L. JANSEN OR HIS  
EMPLOYEES WERE NOT GUILTY OF  
NEGLIGENCE.

The defendant, L. Jansen, was charged with putting the canvas on the floor of the hallway and permitting it to become ruffled and uneven, with permitting tools and equipment to become strewn in the hallway, and with failing to place a barricade or signs or to otherwise warn against the use of the hallway. At the close of plaintiff's case the plaintiff herself had testified as to the location and condition of the equipment as follows:

“Q. Now, will you describe just what happened as you left your apartment?

A. As I came out in the hall, I noticed the cleaning there and started out the usual way, but I did notice that the canvas was rumped at that end. I stepped over, but the right foot caught either in the hole or bunched canvas, and the table was holding it so that it didn't give, and I fell.

Q. Now, was there any equipment or anything in the hallway, or did you notice?

A. The table, the paper hanger's table alone and the canvas, and I don't recall anything else that was there.

Q. Do you remember what side of the hall that was located on?

A. On the east. The table was along the east wall." \* \* \* (R. 84)

"Q. Now, I believe you stated that as you came out of your apartment you observed the paper hangers in the hallway. Is that correct?

A. I did.

\* \* \*

Q. Could you state how far that table extended out from the east wall, approximately?

A. Well, as I remember, it was against the east wall.

Q. It was right against the east wall?

A. Yes.

Q. And then about how far out into the hallway would it extend?

A. Oh, the average width of a paper hanger's table. I don't know what that would be. I don't know whether it would be three feet or a little less, probably.

Q. About three feet would you say?

A. I should say about that, or less, if anything. I wouldn't be sure.

\* \* \*

Q. Then did you observe that canvas that you have mentioned; as you approached the table, *did you observe the canvas?*

A. *Yes, I did.*

Q. *You observed the canvas?*

A. *Yes.*

Q. *And where was that located?*

A. *It was spread over the hallway as far as the end of the table, first end.*

Q. *That would be the south end of the table?*

A. *Yes.*

Q. *The table was running north and south, was it not?*

A. *Yes.*

Q. *And the canvas came out to the south end of the table. Is that correct?*

A. *That's where I caught my foot, and that was the end of the canvas.*

\* \* \*

Q. *Now, you say you observed some other equipment there. Did you observe any other equipment besides the canvas?*

A. *It seems to me there was a container against the other wall up that way. They were getting ready then, of course, that early in the morning and just putting the things up there.*

Q. *There was a container against the other wall. That would be the west wall of the hallway?*

A. *It seems to me there was something standing along, somewhere along.*

Q. *Was that a bucket?*

A. *It would be, I think, a bucket.*

Q. *You think that was a bucket?*

A. *Probably a bucket.*

Q. *A paste bucket?*

A. Yes.

\* \* \*

Q. But it was west of the table so it left a very narrow passageway for you to get between the bucket and the table. Is that correct?

A. Well, it didn't obstruct the passageway. There was plenty of room. I had no thought of not being able to get through. The walk was wide enough to go through.

Q. You thought it was wide enough to get through?

A. Oh, there wasn't anything to make me feel that there was no room to get by because there was room to get by.

Q. Was the bucket west of the table, west of the south end of the table?

A. Yes, because I wouldn't have noticed it—it was, because I didn't get any farther than there, so I wouldn't have seen it. It was near the other wall or by the other wall.

Q. That would be the west wall?

A. Uh huh." \* \* \* (R. 93-97)

Regarding the location of the east stairway and the south stairway, which were available for plaintiff's use, Mrs. Baker testified as follows:

“Q. Now, as you came out of your apartment, I understand there was a stairway at the south end of the hall. Is that correct?

A. Yes.

Q. And you stated that that stairway led out to the back yard of the apartment?

A. That's right.

\* \* \*

Q. Now, that stairway also led down to the hallway of the main floor, the first floor, did it not?

A. Yes.

Q. And that stairway connected the first and second floor in addition to making a connection with the rear door of the apartment?

A. Yes.

Q. And there was just one apartment between your apartment and that back stairway. Is that correct?

A. Yes.

\* \* \*

Q. Now, the stairway on the east side, I believe you stated that went from the second floor down to the east alley, to an alleyway—

A. Yes.

Q. —that was east of the apartment?

A. Yes.

Q. And that stairway also connected the hallway of the second floor with the hallway of the first floor. Is that correct?

A. Yes.

Q. And then at the front, the front stairway, the stairway which you testified you were going toward, that stairway went from the second floor down, from the hallway in the second floor down to the hallway of the first floor. Is that correct?

\* \* \*

A. Yes.

Q. And where that stairway met the hallway of the first floor, is that where the front entrance to the building was?

A. On the first floor, yes.

Q. Now, the hallway of the first floor ran the complete, the full length of the apartment building, did it not?

A. Yes.

Q. Just the same as the hallway of the second floor?

A. Yes.” \* \* \* (R. 91-93)

Under the allegations of the complaint, plaintiff was required to show that a hazardous condition existed and that defendant failed to barricade the hallway or otherwise warn plaintiff of its condition. There was no evidence that defendant's tools and equipment were strewn in the hallway. The only evidence adduced by plaintiff on this point was that the table, the canvas and the bucket had been placed in the hallway. The equipment described by her was simple and commonplace. The evidence did not show that it had been negligently placed in the hallway or that it constituted a hazard. Plaintiff, in fact, saw every piece of equipment of which she complains, and observed particularly the canvas before she stepped over it, and yet she testified: “there wasn't anything to make me feel that there was no room to get by, because there was room to get by.”

There was no allegation of improper lighting or of any other condition which would restrict plaintiff's

ability to see the equipment. As plaintiff saw the very condition complained of and observed the condition of the canvas before her fall, a barricade or other warning would have given her no more notice of the condition than she already had. The testimony, however, shows that the equipment was set up in such a manner that it constituted a barricade. All of the evidence shows that Mr. Jansen and his helper, Mr. Vermaas, placed a table 3 feet wide along the east side of the hall and that a bucket was placed on top of a tool box which was near the west wall of the hallway and west of the south end of the table. While Mrs. Baker testified that she did not remember seeing the tool box, she could not say that it was not there, and she did remember seeing the bucket. The tool box was 18 inches wide and the over-all height of the bucket and tool box was 2 feet 4 inches. The hallway was 5 feet 2 inches wide, and simple arithmetic applied to these facts shows a space between the tool box and table to be so narrow that the equipment itself constituted the barricade which it was intended to be. Mr. Jansen testified in this regard as follows:

“Q. Did you leave a space there then to go between?

A. No. It was where we always put it, and we put that box there as a definite blockade so nobody will go through.

Q. In other words, you wanted to block off the place?

A. We wanted to block off the whole width of the hall, yes.

Q. The whole end of the hall?

A. Yes, sir.''' \* \* \* (R. 132-3)

Mr. Jansen and Mr. Vermaas testified about other equipment in the hallway. They described a 100-watt lamp hanging from the ceiling directly over the table, a 100-watt light in a floor lamp at the north end of the hall, and two ladders with a plank between them placed in such a manner that they blocked the front stairway. No sign was placed on or near the barricade, nor was Mrs. Baker personally told not to attempt to go through, but the equipment of which she complains was so simple and obvious, and when she herself states that she observed it, she cannot claim that she had no warning.

The allegations of the complaint did not state a cause of action against the defendant, Jansen, and the evidence introduced in the case fell short of showing actionable negligence on the part of defendant.

POINT III. THE PLAINTIFF, MRS. BAKER, WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AND HAD ASSUMED THE RISK.

Plaintiff in traversing the hallway had the duty of exercising ordinary care for her own safety. If a hazardous condition did not exist then defendant was not guilty of negligence as previously pointed out. Assuming without admitting that a hazardous condition existed, plaintiff was still required to use ordinary care to ob-

serve such condition. Her testimony clearly establishes that she knew the men were working on the second floor, that she observed the location of the table and bucket and saw the condition of the canvas. We have previously quoted plaintiff's testimony in chief, and after defendant was required to put on his case, plaintiff was recalled to the stand and testified as follows:

“Q. Mrs. Baker, you said the canvas wasn't folded like it is shown in the Exhibit 1 which Mr. Richards showed you. Is that correct?

A. That's right, it wasn't folded like that.

Q. Did you observe whether it was folded at all?

A. Well, I couldn't say as to that. I know it wasn't smooth, and I had to step over it. *It was uneven, and I felt that it was bunched at the end of the table, though, just crumpled up and bunched there, and I did step over with my left foot and caught my right heel in it, and it was held down by the table and didn't give, and it threw me down.*

Q. *And you observed that condition before you stepped over—*

A. *I did.*

Q. —with your left foot?

A. Well, I was walking right along the hallway on my way out to go to work as I always do, and I had no hesitancy about it because it seemed perfectly all right, I could step over that.

Q. You say you observed the bucket there?

A. Yes, I recall there was a bucket, and it seems to me it was right against the wall, and I

can't remember any box whatever, and the bucket wasn't as a barricade across. I know that because I wouldn't have pushed the bucket aside or stepped over it.

Q. But you do remember the bucket being there—

A. Yes.

\* \* \*

Q. You say you don't recall the tool chest being over there?

A. I can't recall there was a box of any kind.

Q. It could have been there, and you just not notice it. Isn't that correct, Mrs. Baker?

A. I wouldn't say there was or wasn't. I didn't—I don't have a picture of it in my mind at all. *I definitely have a picture of that bucket as I just walked around with plenty of room, the table and the canvas and the rumpled part of the canvas. I have a very plain picture in my mind about that.*

Q. How high did the bucket appear to be, Mrs. Baker?

A. Well, I couldn't say how high it was. It wasn't very high. May have been before they were ready to bring the paste. I don't know. I just didn't pay attention. It had the appearance of a waste can rather than a paste can. That is what I would say now. I, of course, wasn't examining it then and thinking about it." (R. 190-192) (Italics ours)

If the evidence could support a finding that a dangerous condition existed in the hallway, then plaintiff was negligent in not discovering it. Plaintiff alleges

that a hazard existed but does not attempt to excuse herself for not seeing it. She does not allege improper lighting or any other condition which would restrict her ability to see. The equipment was simple and obvious and if she did not see it, or seeing it did not recognize it as a hazard, it was because she looked negligently. In the case of *Oswald v. Utah Light and Railway Company*, 39 Utah 245, 117 Pac. 46, plaintiff and her daughter, who had been shopping, entered her automobile which was standing in the street near the sidewalk facing west. There was a street railway track in the middle of the street upon which an electric engine was moving 3 or 4 flat cars in front of it and toward her. She turned her automobile toward the south and looked east along the track and saw only a black object on the track, not noticing whether it was moving at that time. She did not notice the flat cars at all and she had the idea that whatever the black object was she had an abundance of time to get across the street. In affirming the judgment of nonsuit, this court held:

“That contributory negligence bars recovery, and that a plaintiff, who fails to conform to what the law requires of him, or to do what a person of prudence would ordinarily have done under the same or similar circumstances, is guilty of negligence, are axioms of the law. \* \* \*

“The plaintiff, however, testified that she looked, but looked so inattentively or purposelessly that she knew not whether the object seen by her was a street car or something else. The question, therefore, is not whether a prudent per-

son before attempting to cross a street car track ordinarily was or was not required to look for approaching cars, or whether he ordinarily would or would not have done so, but whether a prudent person, in looking, under the circumstances testified to by plaintiff, and exercising the care in that particular that a prudent person ordinarily would exercise, would so have conducted or behaved himself that he, under the circumstances ordinarily would have seen no more than did plaintiff. We must, and do, assume she looked. She so testified. \* \* \*

“May reasonable minds differ that such conduct was the ordinary conduct of a prudent person under the circumstances? We think not. Counsel say that a prudent person in looking as did the plaintiff might well have seen the electric engine but not the flat cars, because they were considerably lower than the object looked at, and because of the infrequency of flat cars pushed or drawn along street car tracks. There may be cases where one may receive impressions by mistaking or misconceiving the facts or objects, or their appearance, and act on such impressions, and not be guilty of negligence. But one may also be guilty of mistaking or misconceiving facts or objects or appearances, negligently. Plaintiff’s not seeing the flat cars, and not knowing whether the black object seen by her was a street car or something else, or whether it was standing or moving, did not result from such a mistake or misconception, but from her conduct in looking in an objectless and aimless manner, from her negligent or careless behavior in that regard. Because of that thoughtless and purposeless manner of looking and of her careless conduct in that regard, the flat cars were not seen by her, though

they were plainly visible and almost in her direct path as she undertook to cross the track.”

It cannot be claimed that some condition unknown or unexpected to plaintiff caused her to fall. She testified that she saw and observed the condition of the canvas “just crumpled up and bunched there,” and stepped over with her left foot and caught her right foot in it and fell. The canvas was not hidden nor concealed and it must be said that plaintiff was negligent as a matter of law in the manner in which she stepped over it.

In the case of *Manes v. Hines and McNair Hotels*, 197 S. W. (2d.) 889 (S. Ct. Tenn. 1946), the plaintiff and her husband sought recovery for injuries resulting from a fall on the slippery floor in the hallway on the fourth floor of a hotel operated by the defendants. A wet spot on the floor about six inches in diameter had been caused by water dripping from an overhead hot water pipe. Mrs. Manes, a woman of sixty-five years of age, came out of her room and stepped on the wet spot on the floor and fell, suffering a broken hip. It appeared that she knew about the wet place being there. In reversing the judgment of the Court of Appeals which had held that the question of contributory negligence was for the jury, and in affirming the trial court which had sustained a motion for directed verdict for the defendant, the court said:

“It was the duty of Mrs. Manes to exercise ordinary care to avoid injury and to make rea-

sonable use of her faculties to avoid danger; and if she used an unsafe way when there was a safe way for her to travel down the hallway, she would be guilty of want of ordinary care. *Memphis Street Railway Co. v. Roe*, 118 Tenn. 601, 102 S. W. 343; *Worsham v. Dempster*, 148 Tenn. 267, 255 S. W. 52.”

“In *American Tobacco Co. v. Adams*, 137 Ky. 414, 125 S. W. 1067, it was held that there could be no recovery by an employee of the Tobacco Company injured while trucking a load of tobacco to its warehouse based upon the mere fact that the roof had leaked and the rain had covered a certain area of the floor over which he had traveled where a similar condition had prevailed several times before to his knowledge, and at the time in question he was clearly able to see and appreciate any danger which might arise from the condition.”

“In *Standard Knitting Mills v. Hickman*, 133 Tenn. 43, 46, 179 S. W. 385, 386, the court said:

“ ‘In our opinion the trial judge and that court should have sustained the motion for such peremptory instructions, on the ground that the danger was so simple and obvious as that the employe could, at a glance observe and comprehend for herself, and so obvious as that it was not incumbent on the employer to give her warning. Plaintiff knew that the floors were cleaned by mopping them with soapy water at intervals, and also the direction the colored woman took, in doing so, as the latter passed the machine in question.’ ”

“The proof shows without contradiction that Mrs. Manes knew about this water dripping and standing on the floor. She testified that she knew

it had existed over a period of many months, and that she used this hallway where this water was standing several times each day. We are of opinion that the conclusion is irresistible that her contributory negligence bars her recovery as a matter of law.’’

The courts have held that where a dangerous condition exists and another way could be used with little or moderate inconvenience, a person who elects to take the dangerous way assumes the risks of so doing. When plaintiff observed the condition of the hallway she had not one but two other exits available to her. The back stairway was only 28 feet south from her apartment door, and with little inconvenience she could have gone down the south stairway to the first floor and proceeded to the front door. The east stairway was between her apartment and the canvas, and she had 56 feet of hallway to traverse during which distance she could observe the equipment and without any inconvenience turn to the right and use the east stairway to the main floor and thence out the front door. Even if she had not seen the barricade until she was within a few feet of it, she could have returned a distance of not to exceed 22 feet and used the east stairway in safety. When plaintiff observed the equipment as it existed and failed to take one of the courses available to her, she was herself guilty of negligence and assumed whatever risk there was of proceeding past the equipment.

In *Raymond v. Union Pacific Railroad Co.*, \_\_\_ Utah \_\_\_, 191 P. 2d. 137 (1948), the plaintiff employee of con-

signee knew that gondola cars were used for carrying loose material, yet during switching operations he stood on the platform of a gondola car loaded with scrap metal and grasped the end piece of the car in such a manner that when part of the load shifted, his hand was crushed. In holding the plaintiff guilty of contributory negligence as a matter of law, this court said:

“The obvious truth, from plaintiff’s own testimony, is that he gave no thought to his own safety. He placed his hand in a position which he knew to be dangerous, when there was a safe method open to him. The court below correctly held that plaintiff was guilty of contributory negligence as a matter of law.”

In the case of *Whalen v. Union Pacific Coal Co.*, 50 Utah 455, 168 Pac. 99, the administrator sought to recover for the death of the deceased resulting from deceased’s coming into contact with a highly charged trolley wire while climbing into an empty coal car used to return the men to the outside of mine and called a “man trip”. Deceased stepped on the bumper of the car instead of boarding from the side and before the electricity in the overhead trolley wire had been shut off. He was attempting to get into the car ahead of some of his fellow employees in order to get out of the mine first. In reversing the judgment for the plaintiff the court held:

“The deceased, also, of his own volition, boarded the man trip in a way recognized by the employees of the company (and under the cir-

cumstances presumably known to him) to be extremely dangerous and hazardous, instead of boarding it in the usual and customary way, which involved but little, if any, danger. It appears that he did this to avoid the probable inconvenience of waiting ten or fifteen minutes after the man trip arrived at the main slope before being taken out of the mine. He was, therefore, as a matter of law, guilty of negligence—negligence that resulted in, and was the proximate cause of, his death.”

In *Nauman v. Central & Lafayette Realty Company, Inc.*, 60 A. (2d.) 242 (S. Ct. N. J. 1948), the plaintiff sued for injuries resulting from slipping on the stairway. The plaintiff was the advertising manager of a tenant in the building and was required to go from his employer's offices on the fourth floor to those on the third floor. He went to the rear stairway which was nearer and convenient to his office and which he had used, for his convenience, many times prior to the accident. At the time of his entering into the stairway, the lights on the third and fourth floors and the light on the stairway were not lighted. Plaintiff walked down the first flight of steps until he came to a landing midway between the floors, which landing consisted of two sections. The faint light from a large skylight above made the two sections of the landing appear to be blended into one and he stepped off the edge of the first section and fell. In reversing the judgment for the plaintiff and holding

that the motions for a nonsuit and for a directed verdict should have been granted, the court said:

“The defendant owed the plaintiff the duty of exercising ordinary care to make the premises reasonably safe. Assuming, but without deciding, that the defendant breached a duty resting upon him to artificially light the stairway in question, we are of the opinion that it conclusively appears that the plaintiff assumed the risk of the dangers resulting from his use of the stairway under the circumstances and such being the case the motions at issue should have been granted.”

“To recover, it was the responsibility of the plaintiff to prove by the preponderance of the evidence that the proximate cause of his injuries was the failure or lack of lights as that was the sole and remaining gist of the alleged actionable negligence. If that be so, then he assumed to his knowledge the risk of danger from the very thing which is the foundation of the complaint. Within his knowledge, there was also available to him for use an elevator and the front stairway. *Costanzo v. Prudential Insurance Co., Inc.*, Sup. 1938, 121 N. J. L. 361, at page 363, 2 A. 2d. 882. There was janitor service in the building. The janitor could have been advised and a correction made before the descent was undertaken.

“The test is whether an ordinary prudent person would under the same or similar circumstances have incurred the risk which such conduct involved. *Solomon v. Finer*, Sup. 1935, 115 N. J. L. 404, 180 A. 567; *Bianchi v. South Park Presbyterian Church*, Err. & App. 1939, 123 N. J. L. 325, 8 A. 2d 567, 124 A.L.R. 808. Where it indisputably appears to the contrary, the question is one of law for the court.”

The cases of *Bianchi v. South Park Presbyterian Church*, 123 N. J. L. 325, 8 A. 2d. 567, and *Solomon v. Finer*, 115 N. J. L. 404, 180 A. 567, cited by the court above, both deal with the use by plaintiff of unlighted stairways when the danger could have been avoided. In the *Bianchi* case the court said:

“Reason and justice dictate that one cannot deliberately incur an obvious risk, especially where preventive means are at hand, and then hold the author of the danger for the ensuing damage. Whether such conduct be classed as an assumption of risk or contributory negligence, it precludes recovery. There was no controversy here as to what plaintiff did or failed to do; and the evidence was not fairly susceptible of divergent inferences on the question of whether her conduct met the requirements of due care. It did not reasonably admit of an affirmative answer to that inquiry. Plaintiff was *sui juris*. She indisputably knew and appreciated the hazard of injury arising from the special circumstances. The danger was obvious to one reasonably careful for his own security. And there was no element of compulsion in what plaintiff did. The course taken was wholly voluntary; it was in no sense one of necessity or reasonably to be considered as such by the actor. She did not take advantage of known available means to insure her safety. She made no effort to apprise the sexton of her plight, either directly or through others in the building, nor did she secure the aid of the light in the locker room which the opening of the door would have provided. Thus, it conclusively appears that, fully comprehending the risk, plaintiff chose to rely upon her ability to

descend the stairs without mishap; and in such circumstances she cannot visit upon the sexton the consequences of her fall. Compare *Gleason v. Boehn*, 58 N. J. L. 475, 34 A. 886, 32 L. R. A. 645; *Saunders v. Smith Realty Co.*, 84 N. J. L. 276, 86 A. 404; *Rooney v. Siletti*, 96 N. J. L. 312, 115 A. 664; *Solomon v. Finer*, 115 N. J. L. 404, 180 A. 567. The cases of *Andre v. Mertens*, 88 N. J. L. 626, 96 A. 893, and *Roth v. Protos*, 120 N. J. L. 502, 1 A. 2d. 10, are factually distinguishable.”

In the *Solomon* case the court pointed out that plaintiff proceeded into a dark stairway without seeking light or aid and held as follows :

“Respondent, in these circumstances, was plainly guilty of culpable negligence. The obligation rested upon him to exercise reasonable care for his own safety. The inquiry is whether fair-minded men might honestly differ as to whether his conduct was such as one exercising ordinary care and prudence would have pursued under the circumstances. *Pesin v. Jugovich*, 85 N. J. Law, 256, 88 A. 1101. And it must, perforce, be answered in the negative. His conduct was not the subject of conflicting evidence; nor does the evidence reasonably permit of divergent inferences respecting it. \* \* \*

“The evidence did not fairly admit of an inference of reasonable care by respondent. On the contrary, it indisputably appears that he, by the exercise of ordinary care, could have avoided the consequences to himself of appellant’s negligence found by the trial judge. See *Gleason v. Boehm*, 58 N. J. Law, 475, 34 A. 886, 32 L. R. A. 645; *Saunders v. Smith Realty Co.*, 84 N. J. Law,

276, 86 A. 404; *Eggert v. Mutual Grocery Co.*, 111 N. J. Law, 502, 168 A. 312.”

In the case of *Harmony Realty Co. v. Underwood*, 161 N. E. 924 (S. Ct. Ohio 1928), plaintiff sought to recover for injuries received when she stumbled on loose stones covering the sidewalk and was thrown upon a pile of crushed stone lying adjacent thereto. Plaintiff was a tenant in a building owned by the defendant and was accustomed to using the rear entrance and the sidewalk which was in the process of being cemented. Plaintiff testified, as she proceeded along the sidewalk, she saw the crushed stone lying thereon, some as small in size as a navy bean and some as large as an inch in diameter. In reversing the judgment for the plaintiff and holding that the trial court erred in refusing to direct a verdict for the defendant as requested, the court stated:

“The plaintiff testified to the character of the place where she slipped and fell. She saw the stones on the sidewalk; she had actual notice of the situation, that the defendant did not have, and, under the circumstances, testified to by her, she assumed the risk of which she now complains; she attempts to relieve herself of her own lack of care by testifying that, upon her return, she had a basket of provisions in one hand and a hand bag in the other. While this may have impaired her efforts to successfully pass over these pebbles or stones, it did not relieve her from the exercise of due care, incumbered as she was with the packages which she carried, especially where she testified that only a few minutes before she

obtained full knowledge of the conditions affecting the safety of the walk. The testimony is undisputed that the plaintiff could have safely entered her apartment by the front instead of the rear entrance and thereby have avoided the obstruction. She not only voluntarily passed over a place where the source of danger was plainly visible, but she had actual notice of its attendant risk. *Village of Conneaut v. Naef*, 54 Ohio St. 529, 44 N. E. 236.”

Assumption of risk is not limited to master and servant cases. This is set out by this court in the case of *Taylor v. Bamberger Electric R. Co.*, 62 Utah 552, 220 Pac. 695 (1923). There plaintiff recovered judgment against the defendant carrier for injury sustained while a passenger on defendant's train. Plaintiff was returning from Lagoon to Ogden on Labor Day and boarded a very crowded car, standing in the aisle until the train had reached Layton, about six miles from Lagoon on the way to Ogden. At Layton, plaintiff and a friend went through a window in the car, because of the crowded condition and smoke in the car, and ran to the rear of the train and got on the steps of one of the open cars, which steps were also crowded and difficult to hold on to. During the subsequent ride the train lurched in a place where there appeared to be some defect in the track and plaintiff was thrown from the car and injured. In reversing the judgment for the plaintiff, the court said:

“As pointed out by this court in *Kuchenmeister v. L. A. & S. L. R. R. Co.*, 52 Utah 116,

172 Pac. 725, there is a clear distinction between contributory negligence, and assumption of risk. It has, however, also been held that under certain circumstances the same acts or conduct may make one guilty of contributory negligence and also give rise to the defense of assumption of risk.

“The undisputed facts and circumstances, according to the authorities to which we shall hereinafter refer, clearly bring this case within the doctrine just stated. In view of plaintiff’s statements, there is not a shadow of doubt that he acted with full knowledge of all the circumstances surrounding him and that all he did in the premises was done deliberately and with full appreciation of the danger to which he exposed himself. True, he may not have anticipated the lurching or swaying of the cars; hence it is contended that because the lurching of the cars was due to the defendant’s negligence plaintiff did not assume the risk. It no doubt is true that under ordinary circumstances a passenger will not be held to have assumed a risk arising out of a carrier’s negligence. In this case, however, the circumstances are extraordinary.”

The cases of *Nauman v. Central and Lafayette Realty Company, Inc.*, supra, *Bianchi v. South Park Presbyterian Church*, supra, *Wilson v. Lapham Real Estate Company*, 175 A. 480 (S. C. & R. I.); *Whalen v. Union Pacific Coal Company*, supra, all indicate that not only is the defense of contributory negligence available but also the defense of assumption of risk.

In *Costanzo et al v. Prudential Ins. Co., Inc.*, 121 N. J. L. 361, 2 A. (2d) 882 (S. Ct. N. J. 1938), the court

reversed the judgment for the plaintiff for injuries sustained when he tripped on a broken stairway step in defendant's building. Plaintiff was employed by defendant's tenants as a store clerk and was sent to the cellar to get some wrapping paper. There were three separate stairways to the building and plaintiff knew that the other stairways were available and that the stairway on which he tripped was in bad condition. The court held:

“We are entirely satisfied that, were the question of negligence alone involved, the trial judge would have been correct in submitting this cause to the jury to determine whether defendant breached its duty to use reasonable care to keep the stairway in a safe and usable condition. *Roth v. Protos*, 120 N. J. L. 502, and cases therein cited on page 504, 1 A. 2d. 10, 11. But the existence of negligence was not the sole issue here. For, conceding defendant's negligence, we are equally well satisfied that plaintiff failed to establish a right of recovery, since he clearly assumed what risk there was in using the stairway in question. By his own admissions it appears that the broken condition of the steps prevailed throughout his entire employment of about four months; and that he ‘often’ used that stairway. Furthermore, plaintiff himself testified that the stairway was in ‘very bad condition’ and that he considered it ‘dangerous’. In addition to all this, and unlike the proof in *Herman v. Home Owners’ Loan Corporation*, 120 N. J. L. 437, at foot of page 440, 200 A. 742, at page 744, which was ‘that no other way was available,’ the plaintiff here could have used either of the other two available stairways the safety of which had not been chal-

lenged. To use the stairway he did under these circumstances was to assume the risk which might and did result from that use. *Volenti non fit injuria*.

“We perceive nothing which distinguishes the instant case from the holdings in *Vorrath v. Burke*, 63 N. J. L. 188, 42 A. 838, and *Rooney v. Siletti*, 96 N. J. L. 312, 115 A. 664. Cf. *Harenburg v. August*, 119 N. J. L. 83, especially cases collated on page 87, 194 A. 152, 154.”

In the case of *Birthisel v. Comcord Premium Building & Loan Ass'n.*, 343 Pa. 194, 22 A. 2d. 685 (S. Ct. Pa. 1941), plaintiff, who had been living with her daughter for several weeks, knew of the defective steps of her daughter's rented home and although she could have used another exit with but slight inconvenience chose to use the dangerous steps and was injured when one of the steps broke. The court held:

“The court below properly entered a compulsory nonsuit as the testimony clearly establishes that plaintiff was guilty of contributory negligence in testing a known danger. There was no necessity for her to leave by the steps which she knew were in a dangerous condition. She could have used the exit through the cellar with but slight inconvenience. Having chosen to use a way subject to risk and danger, when a safe way was available to her, she must bear the consequences of her choice: *Levitt v. B/G Sandwich Shops, Inc.*, 294 Pa. 291, 144 A. 71; *Boyd v. Kensington Water Co.*, 316 Pa. 522, 175 A. 395; *Smith v. Pittsburgh*, 338 Pa. 216, 12 A. 2d. 788; *Valente v. Lindner*, 340 Pa. 508, 17 A. 2d. 371.

In *Johnston v. Tourangeau et al*, 259 N. W. 187 (S. Ct. Minn. 1935), plaintiff tenant tripped on a broom handle on an unlighted rear stairway. There was an additional stairway in front, well lighted and well known by the plaintiff. In affirming the verdict directed in favor of the defendant, the court said:

“If plaintiff was to take the risk of walking in darkness ‘feeling his way,’ he assumed the risk of encountering such a common and customarily used article as a broom. Id. § 7041a. This feature of defendants’ claimed negligence is indeed weak and unsatisfactory. Be that as it may, the fact remains that plaintiff chose a route of darkness rather than one of light. He should not be heard to complain.”

In *Colburn v. Shuravlev*, 24 Cal. App. 2d. 298, 74 P. (2d.) 1060 (Cal. 1938) (Hearing denied), the plaintiff, a tenant of the defendant, sued to recover damages for injuries sustained when she tripped over a defective rug in defendant’s apartment and fell. She had removed the rug from its usual place in the hall and had placed it on the living room rug for the purpose of cleaning it. The front door bell rang, she hurried to the door, tripped on the rug, fell and was injured. Plaintiff had twice notified defendant’s manager of the defect in the rug and had been promised that it would be repaired. In affirming a nonsuit for the defendant the court said:

“ ‘In the absence of special warranty or agreement, the tenant in taking the leased premises assumes all risks arising from damages which are obvious to ordinary observation.’

“It is sufficient to cite in support of the text *Watwood v. Fosdick*, 212 Cal. 84, 297 P. 881; *Griggs v. Cook*, 106 Cal. App. 551, 289 P. 693; *Ellis v. McNeese*, 109 Cal. App. 667, 293 P. 854; *Priver v. Young*, 62 Cal. App. 405, 216 P. 966, and *Van Every v. Ogg*, 59 Cal. 563. The purport of these decisions is that, when a tenant voluntarily remains on leased premises with full knowledge of their dangerous or defective condition, he assumes all risks which are obvious to ordinary observation.”

The following cases further support defendant's position that plaintiff was guilty of contributory negligence as a matter of law in failing to observe and appreciate the condition of the hallway and in failing to pay attention to the manner in which she stepped over the canvas and that she was guilty of contributory negligence and assumed the risk in proceeding as she did where other stairways were available for her use: *Ward v. Clark*, 177 S. E. 212 (S. Ct. of App., Va.); *Wilson v. Lapham Real Estate Company*, 175 A. 480 (S. Ct. R. I.); *Fonyo v. Chicago Title & Trust Company*, 16 N. E. 2d. 192 (Ill. App.); *Fabel v. Boehmer Realty Company*, 227 S.W. 858 (Mo.); *Wright v. Jones*, 193 So. 197 (La.); and *Cutro v. Scranton Medical Arts Building*, 198 A. 141 (S. Ct. Penn.).

Under Points I, II and III, defendant has set forth the failure of plaintiff's amended complaint to state a cause of action, the failure of plaintiff's evidence to show culpable negligence on the part of defendant or his employees, and that plaintiff herself was guilty of con-

tributory negligence and had assumed the risk as a matter of law. Such being the case, it follows that defendant's motion for a directed verdict should have been granted, and likewise defendant's motion for nonsuit, motion for judgment notwithstanding the verdict and motion for new trial.

POINT IV. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON PLAINTIFF'S THEORY OF THE CASE AS SET FORTH IN HER PLEADINGS AND NOT IN ACCORDANCE WITH THE EVIDENCE, AND IN REFUSING TO INSTRUCT THE JURY ON DEFENDANT'S THEORY OF THE CASE AS REQUESTED.

In Instruction No. 4, which will be discussed more in detail as Point V, the trial court gave plaintiff's requested Instruction No. 3, as follows:

“You are instructed that it was the duty of the defendant, L. Jansen, and his employees to keep the floor of the hallway on the second floor of the apartment building reasonably safe for plaintiff in her use of the hallway, and that if the said defendant in spreading canvas on the floor or in permitting tools and equipment to be left and strewn about the hallway in such a manner as to make the hallway dangerous, or not reasonably safe for the plaintiff in her use thereof, then the said defendant was negligent.” (R. 31-2 and 52.)

In Instruction No. 5 the trial court gave plaintiff's requested Instruction No. 2, as follows:

“You are instructed that if the defendant, L. Jansen, and his employees, while performing their work in the hallway on the second floor of the Roosevelt Apartments, knew or should have known that it would not be reasonably safe for persons using said hallway to cross over the canvas or pass their equipment, then it was the duty of said defendant or his employees either to block off said hallway where they were working or to instruct and advise persons using the same to use the other stairway; and if you find from the evidence that they failed in this duty and that by reason thereof plaintiff, while using ordinary care for her own safety, was injured, then your verdict shall be in favor of the plaintiff and against the defendant.” (R. 32 and 51.)

In Instruction No. 8 (R. 34) the trial court defined negligence to the jury and in Instruction No. 10 the court instructed the jury on the measure of damages. (R. 34-5). In giving these instructions the court submitted plaintiff's entire theory of the case to the jury and instructed the jury on plaintiff's pleadings, which were not supported by the evidence. The giving of these instructions was excepted to by defendant (R. 198-200) and assigned as error in the Statement of Errors 4, 5, 6 and 7.

As discussed under Point I, there was no showing of negligence on the part of plaintiff, and it was error for the court to give any instructions on negligence. Cer-

tainly there was no proof that equipment and tools were “strewn about the hallway.” The defendant’s evidence was that they were placed there in an orderly and systematic manner and this testimony was not disputed by plaintiff. The equipment was simple and obvious and was observed by defendant. When plaintiff saw the very thing which she claims constituted a hazard, a barricade or warning as required by Instruction No. 5 could give plaintiff no more notice than she already had, and to instruct the jury that the defendant had the duty to “block off said hallway where they were working or to instruct and advise persons using the same to use the other stairway” was error.

Even more serious was the court’s refusal to instruct the jury on defendant’s theory of the case, and its refusal to give defendant’s requested Instructions 6, 8 and 9, as follows:

“You are instructed that Mrs. Baker in traversing the hallway of the apartment was not relieved of the necessity of exercising ordinary care for her own safety. If you find that the defendant’s equipment was placed in the hallway in such a manner that it constituted a hazard which plaintiff under the circumstances should have observed and that plaintiff, notwithstanding the fact that other exits were available to her, proceeded to take the hazardous course, then you must find that she assumed the risk of any injury which she sustained and your verdict shall be in favor of the defendant Jansen, no cause of action.” (R. 45)

“If you find that the defendant’s equipment was placed in the hallway in such a manner that it constituted a hazard and that plaintiff observed, or in the exercise of ordinary care should have observed such hazard, then you are instructed that plaintiff was negligent in not taking either the east or south stairways which were available to her and your verdict shall be against the plaintiff and in favor of the defendant Jansen, no cause of action.” (R. 47)

“You are instructed that Mrs. Baker in traversing the hallway of the apartment is not relieved of the necessity of exercising ordinary care for her own safety regardless of whether the equipment of the defendant was so placed in the hallway that it did or did not constitute a hazard. Therefore, if you believe from all of the evidence that plaintiff acted in a careless or negligent manner in passing by or over the equipment and that such carelessness or negligence resulted in the injury complained of, your verdict shall be in favor of the defendant L. Jansen, no cause of action.” (R. 48)

The defendant excepted to the court’s refusal to give these requested instructions (R. 197-8) and has assigned such refusal as error in Statement of Errors 8, 9 and 10. In Instruction No. 6 the court did instruct that the plaintiff was guilty of contributory negligence if she failed “to keep a lookout for her own safety” or “to observe the condition which existed in the hallway.” But defendant claimed also that if the jury found that a hazard existed which should have been observed by plaintiff and that she took the hazardous course when other exits were available to her, she assumed the

risk (defendant's requested Instruction 6) that if a hazard existed that should have been observed by plaintiff, then she was negligent in not taking either the east or south stairways which were available to her (defendant's requested Instruction 8) and that the plaintiff was negligent in the manner in which she stepped over the canvas (defendant's requested Instruction 9).

This court has held in the case of *Pratt v. Utah Light and Traction Co.*, 57 Utah 7, 169 Pac. 868, that a definition of contributory negligence as want of ordinary care, though abstractly correct, should be specifically applied to the circumstances of the case. In its opinion the court said:

“Each party to a suit is entitled to have his theory, when there is evidence to sustain it, submitted to the jury and the judgment of the jury on the facts tending to support such theory, assuming always that there is testimony offered to support the same, and this court has so held in *Hartley v. Salt Lake City*, 41 Utah 121, 124 Pac. 522, where, speaking through Straup, J., it is said:

“ ‘There are two parties to a lawsuit. Each, on a submission of the case to the jury, is entitled to a submission of it on his theory and the law in respect thereof. The defendant's theory as to the cause of the accident is embodied in the proposed requests. There is some evidence, as we have shown, to render them applicable to the case. That is not disputed. We think the court's refusal to charge substantially as requested was error. That the ruling was prejudicial and works a re-

versal of the judgment is self-evident and unavoidable.' ''

In the case at bar the trial court defined contributory negligence generally and gave defendant's requested instruction on contributory negligence as applied to her failure to keep a lookout for her own safety and to observe the condition in the hallway (Instruction 6), but the court in refusing to give defendant's requested Instructions 6, 8 and 9 failed to instruct the jury on defendant's theory that plaintiff was also negligent in not taking the east or south stairway, that she was negligent in the manner in which she stepped and that she assumed the risk of the danger of which she complains. There was evidence to support defendant's claim that plaintiff proceeded negligently. She testified that she saw the condition of the canvas, stepped over it with her left foot and caught her right heel in it. The defendant was entitled to have the jury instructed on contributory negligence as it applied to the manner in which plaintiff stepped and defendant's requested Instruction 9 should have been given. Plaintiff testified that she observed the condition of the equipment in the hallway and she knew that the east and south stairways were available for her use. The defendant was entitled to have the jury instructed on contributory negligence and assumption of risk as applied to plaintiff's failure to use one of the other ways which were available to her as requested by defendant's requested Instructions 6 and 8.

In *Morgan v. Bingham Stage Lines Co.*, 75 Utah 87, 283 Pac. 160, the trial court instructed the jury on the

contributory negligence of the deceased, Orson Morgan, as follows:

“ ‘You are instructed that contributory negligence is the failure to use that ordinary care and diligence that would be expected of an ordinary prudent person of similar age and experience to that of the deceased, Orson Morgan, under like circumstances to avoid an injury. Therefore, even though you find that the defendants were negligent, still, if you find that the deceased, Orson Morgan, did not exercise that ordinary care and diligence to prevent injury to himself that would be expected of ordinary and prudent persons of similar age and experience situated as Orson Morgan was, you should find for the defendants and against the plaintiff, no cause of action.’ ”

After quoting the rule laid down by Justice Straup in *Hartley v. Salt Lake City*, supra, the court said and held:

“Respondent’s counsel apparently do not contest this rule of law, but they argue these requests were substantially covered, as the court found was the case in the cases cited. The court in other instructions set forth fully plaintiff’s theory of the evidence as to the alleged negligence on the part of the defendants, but, except as pointed out, gave no instructions on defendants’ theory.

“While the requests are not models of accuracy, we think the defendants were entitled to have at least the substance of the same given so as to present their theory of the evidence to the jury, and that a failure on the part of the court to do so was prejudicial error.”

In *Anderson v. Nielson, et al*, 43 Utah 564, 137 Pac. 152, the trial court submitted plaintiff's theory of the case to the jury and submitted one of defendant's theories of the cause of the accident but failed to instruct on an additional theory requested by defendant. In reversing the judgment of the trial court and granting a new trial the court said:

“The defendant requested a submission of the case on the theory that he was not responsible for the premature releasing of the snubbing rope, if the order given by him was directed to the man at the rear tackle but was misunderstood by the men at the snubbing rope, and that rope prematurely released because of such misunderstanding or mistake, as did the plaintiff on the theory that the defendant was responsible if the order given by him was directed and given to the men at the snubbing post. The court submitted the case on both such theories. The defendant, in addition, also requested the court to submit the case on the theory that the failure of the man to release the rope at the rear tackle, and who had been commanded to release it, was the cause of the accident. The court refused that request, and did not submit the case upon such theory. The court erred in that. \* \* \*”

There is a clear distinction between contributory negligence and assumption of risk. This distinction has been recognized by this court.

In the case of *Kuchenmeister v. Los Angeles & S. L. R. Co.*, 52 Utah 116, 172 Pac. 725 (1918), the plaintiff was injured while employed in defendant's roundhouse and

machine shop while engaged in repairing a passenger engine and using an emery wheel to grind down a pin. A small piece of steel or other hard substance was thrown off from said emery wheel which entered his eye and resulted in the eyeball being removed. The court discussed the two defenses as follows:

“Assuming however, for the purpose of this decision, that the jury found that plaintiff’s conduct at the time of the injury was negligent, and hence found him guilty of contributory negligence in that regard, yet it does not necessarily follow that counsel’s contention that plaintiff assumed the risk should prevail. The defenses of assumed risk and contributory negligence are entirely independent, and in case there is a conflict in the evidence, or where the facts are such that reasonable men may legitimately draw different conclusions from the evidence, or may arrive at different conclusions, it cannot be determined as a matter of law that either the one or the other defense is established, and the jury may therefore find that one of the defenses was established and may also find that the other was not. While in some of the cases there is some confusion respecting the distinction between the two defenses, yet, as a general rule, the courts have found little difficulty in enforcing the true distinction. The distinction is, perhaps, as well and clearly stated in a few words as that can be done in the case of *Thomas v. Quartermaine*, in L. R. 18, Q. B. Div. at page 697, where, in discussing the distinction, it is said:

“ ‘But the doctrine of *volenti non fit injuria* (assumed risk) stands outside the defense of contributory negligence and is in

no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, *but carelessness is not the same thing as intelligent choice.*'' (Italics ours.)

POINT V. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 4 AND IN INSTRUCTING THE JURY ORALLY AND THEN STRIKING A PART THEREOF FROM THE WRITTEN INSTRUCTION.

The trial court orally gave to the jury plaintiff's requested instruction No. 3 as follows:

"You are instructed that it was the duty of the defendant L. Jansen, and his employees to keep the floor of the hallway on the second floor of the apartment building reasonably safe for plaintiff in her use of the hallway, and that if the said defendant in spreading canvas on the floor or in permitting tools and equipment to be left and strewn about the hallway in such a manner as to make the hallway dangerous, or not reasonably safe for the plaintiff in her use thereof, then the said defendant was negligent, *and if you find that in exercising ordinary care for her own safety, plaintiff was injured by the negligence of the defendant, if you find that the defendant was negligent, then your verdict should be for the plaintiff and against the defendant Jansen.*"

After the court had given the instruction orally, he struck from the written instruction that part which is italicized. Defendant excepted to the giving of Instruc-

tion No. 4 and particularly to the court orally instructing the jury in the language italicized above. (R. 198-9) The court offered to recall the jury and reread Instruction No. 4 to them, but thought that to do so would give emphasis to the instruction. The court did not offer to change Instruction No. 4 and the defendant has assigned as error both the giving of written Instruction No. 4 and the reading of that part which was stricken. (Statement of Error 5)

In giving Instruction No. 4, the court in effect instructed the jury that defendant Jansen was guilty of negligence. The court said "that if the said defendant *in spreading the canvas on the floor or in permitting the tools and equipment to be left and strewn about the hallway in such a manner as to make the hallway dangerous or not reasonably safe for the plaintiff in her use thereof*, then the defendant was negligent. A careful reading of the instruction shows that there was nothing left for the jury to determine. The court has in effect stated that it is undisputed that the canvas was spread in such a manner as to make the hallway dangerous and not reasonably safe for the plaintiff and that the tools and equipment were permitted to be left and strewn about the hallway in such a manner as to make the hallway dangerous and not reasonably safe for plaintiff. A similar situation was before this court in *Webb v. Snow, et al.* 102 Utah 435, 132 P. (2d) 114, which involved an alleged assault and battery against plaintiff. There was a dispute in the testimony as to whether plaintiff was

“knocked to the floor,” whether she was “rendered unconscious,” whether she “suffered a miscarriage,” and as to the force with which she was struck. The court instructed the jury as follows:

“The court instructs you that if you believe from the evidence that the plaintiff was pregnant at the time she was *rendered unconscious* by the blow delivered by one of the defendants’ employes, and as a result of said blow and being knocked to the floor she suffered a miscarriage and thereby the loss of her unborn child, you may award her money damages for the *loss of said unborn child*.” (Italics added.)

In reversing the judgment of the lower court and holding the instruction to be prejudicial error, the court said:

“The foregoing instruction disregarded entirely the fact that there was considerable dispute and conflict in the evidence. The instruction, standing alone, would amount to an instruction to find in favor of the plaintiff if the jury found that plaintiff was pregnant at the time she was struck, and if they also found that a miscarriage resulted. The instruction assumes that defendants’ employees were to blame for what occurred, and that the evidence was uncontradicted as to the following: (1) That plaintiff was ‘rendered unconscious’ by the ‘blow,’ and (2) that she was knocked to the floor. The instruction is so worded that it indicated to the jury a belief on the part of the court that defendants’ employees were blameworthy irrespective of the acts of plaintiff.

As stated in *State v. Seymour*, 49 Utah 285, 163 P. 789, 792:

“ ‘Courts, in charging jurors, should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumes any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary.’ ”

“The foregoing statement was quoted with approval in *State v. Hanna*, 81 Utah 583, 21 P. 2d. 537, at page 540. While both were criminal cases, the principle announced therein applies with equal force to jury trials in civil cases. The court must not resolve conflicts in evidence for the jurors or indicate what particular testimony the trial court believes correctly states the facts.  
\* \* \* ”

In requesting the court to give Instruction No. 4, plaintiff led the court into error. The first part of the Instruction as it was read to the court entirely disregarded the fact that there was a dispute in the evidence and assumed that the evidence was uncontradicted as to the defendant's spreading the canvas and permitting the tools and equipment to be left and strewn about the hallway in such a manner as to make it dangerous. That part of the instruction standing alone amounted to an instruction to find the defendant negligent, and it stood alone when the court struck the part italicized above

from the written instruction. The court's striking the last part of the instruction as it was given orally left the erroneous part standing alone and exaggerated its importance in the minds of the jury.

## CONCLUSION

The plaintiff in this case was fully aware of the condition of which she complains. She testified that she knew the defendant Jansen and his men were working in the hallway and that she saw the paper hanger's table, the paste bucket and the canvas. She knew that the east and south stairways were available for her use and that without any inconvenience she could have walked down either stairway to the main floor and out the front door. She testified that she observed the condition of the canvas, bunched and uneven, and stepped over it with her left foot and caught her right heel in it. Plaintiff complains that a hazard was created by defendant and that she was not warned of its existence, yet the fact is undisputed that defendant's equipment was open and obvious and that plaintiff fully observed the situation of which she complains. The facts as applied to the law make it clear that plaintiff's own negligence in stepping as she did caused her to fall and that as a matter of law she was herself guilty of negligence and assumed the risk of proceeding as she did when other stairways were available to her. The

defendant's motion for nonsuit should have been granted, and likewise, in order, his motion for directed verdict, for judgment notwithstanding the verdict, and for new trial. Other errors occurring in the trial of the case prevented defendant Jansen from having a fair trial, and the judgment of the trial court should be reversed.

Respectfully submitted,

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